Supreme Court, U.S.
FILED

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No. ——

IN THE
Supreme Court of the United States

NIKKI LEADER,
Petitioner,

v.

LIVINGSTON PARISH SCHOOL BOARD;
J. ROGERS POPE; and J. LLOYD WAX,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the excusable neglect standard of *Pioneer Investment Services Company v. Brunswick Associated Limited Partnership* apply to the exercise of discretion by a district court to either dismiss a suit or extend the time for service of the summons and complaint under Federal Rule of Civil Procedure 4(m)?

2. In the face of a statute of limitation bar to re-filing suit, is a plaintiff, even absent a showing of good cause, still entitled under Rule 4(m) to have the district court determine whether excusable neglect warrants an extension of the service deadline rather than dismissal of the suit?

PARTIES TO THE PROCEEDING

The following were parties to the proceedings in the United States Court of Appeals for the Fifth Circuit:

1. Nikki Leader (plaintiff
2. Livingston Parish (Louisiana) School Board (defendant)
3. J. Rogers Pope (defendant)
4. J. Lloyd Wax (defendant)

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Preliminary Statement	2
B. Statement of Facts	3
C. Procedural History	4
REASONS FOR GRANTING THE WRIT	10
I. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THE THIRD AND FOURTH CIRCUITS REGARDING THE APPLICABLE STANDARD FOR TREATMENT OF UNTIMELY SERVICE OF SUMMONS AND COMPLAINT UNDER FRCP 4(m)	11
II. THE FIFTH CIRCUIT'S DECISION CONFLCTS WITH A DECISION OF THIS COURT, OTHER DECISIONS OF THE FIFTH CIRCUIT AND DECISIONS OF OTHER CIRCUITS REGARDING THE APPLICABILITY OF THE *PIONEER* EXCUSABLE NEGLECT STANDARD TO UNTIMELY ACTIONS OF LITIGANTS UNDER THE FEDERAL RULES OF CIVIL PROCEDURE	14

TABLE OF CONTENTS—Continued

Page

III. THE FIFTH CIRCUIT'S DECISIONS PRESENTS IMPORTANT QUESTIONS THAT SHOULD BE DECIDED BY THIS COURT REGARDING THE APPLICABILITY OF THE EXCUSABLE NEGLECT STANDARD TO FRCP 4(m) DECISIONS AND THE PROPER TREATMENT OF STATUTE OF LIMITATION PROBLEMS UNDER FRCP 4(m) 15

CONCLUSION 16

APPENDICES

APPENDIX A:

Decision of the United States Court of Appeals for the Fifth Circuit 1a

APPENDIX B:

Ruling of the United States Court for the Middle District of Louisiana on Plaintiff's Motion for Reconsideration 3a

APPENDIX C:

Judgment of the United States District Court for the Middle District of Louisiana 7a

APPENDIX D:

Ruling of the United States District Court for the Middle District of Louisiana on Defendant's Motion to Dismiss 8a

APPENDIX E:

Order of the United States Magistrate Judge, Middle District of Louisiana, January 6, 1998 ..... 10a

APPENDIX F:

Order of the United States Magistrate Judge, Middle District of Louisiana, December 11, 1997..... 11a

TABLE OF AUTHORITIES

Cases Page

Boley v. Kaymark, 123 F.3d 756 (3rd Cir. 1997).. 14
Halicki v. Louisiana Casino Cruises, 151 F.3d 465 (5th Cir. 1998) 14
Henderson v. U.S., 517 U.S. 654, 116 S.Ct. 1638 (1996) 16
In re Richards, 1999 U.S. App. LEXIS 908 (4th Cir., January 25, 1999) 14
Lindsey v. United States Railroad Retirement Board, et al, 101 F.3d 444 (5th Cir. 1996)..... 8, 12
McGinnis v. Shalala, 2 F.3d 548 (5th Cir. 1993).. 9, 12
Pioneer Investment Services Company v. Brunswick Associated Limited Partnership, 507 U.S. 380, 113 S.Ct. 1489 (1993) ..... *passim*
Rosics v. The Waverly Group, Inc., 1999 U.S. Dist. LEXIS 1079 (N.D. Tex., January 27, 1999) 15
Stutson v. United States, 516 U.S. 193, 116 S.Ct. 600 (1996) 14
Wilson v. Time Warner, Inc., 1999 U.S. Dist. LEXIS 2677 (S.D.N.Y., March 11, 1999)..... 15

U.S. Code

28 U.S.C. § 1254 2

Federal Rules of Civil Procedure

Rule 4(j) 9, 10, 12
Rule 4(m) ..... *passim*
Rule 6(b) ..... *passim*

Other Authorities

FRCP Rule 4(m), Advisory Committee Notes, 1993 Amendments 10, 13, 15

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The decisions of the United States District Court for the Middle District of Louisiana are not reported. They are included in the Appendix as Appendices B, C and D. The opinion of the United States Court of Appeals for the Fifth Circuit is not reported. It is included in the Appendix as Appendix A.

JURISDICTION

The judgment of the Fifth Circuit affirming the decisions of the District Court was entered on February 12, 1999. This Petition for a Writ of Certiorari is being filed

within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 4(m):

> *"Time Limit for Service.* If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j)(1)."

STATEMENT OF THE CASE

A. Preliminary Statement

This petition presents the issue, not heretofore addressed by this Court of whether the excusable neglect standard articulated in *Pioneer Investment Services Company v. Brunswick Associated Limited Partnership,* 507 U.S. 380, 113 S.Ct. 1489 (1993), must be applied by a district court in deciding whether to dismiss a case, ostensibly without prejudice, or extend the service period under Federal Rule of Civil Procedure 4(m) when a plaintiff has failed to effect service within 120 days of filing a complaint. The issue is critical in situations where a dismissal "without prejudice" is fatally prejudicial because a statute of limitations bars re-filing the complaint. The Fifth Circuit affirmed a district court order dismissing plaintiff Nikki Leader's suit under Rule 4(m) because of untimely service, and declined to consider whether the

untimely service constituted excusable neglect, warranting an extension of the service deadline. Leader's suit is now time-barred. The Fifth Circuit's decision is contrary to precedent of this Court mandating an excusable neglect standard for evaluating other tardy actions by litigants under federal procedural rules and conflicts with decisions in other circuits either (i) applying an excusable neglect standard to untimely service under Rule 4(m) or (ii) recognizing a statute of limitations impediment to re-filing suit as an expressly legislatively-favored basis for extending the service deadline.

B. Statement of Facts

On September 9, 1997, plaintiff Nikki Leader filed suit in United States District Court, Middle District of Louisiana, against defendants, the Livingston Parish (Louisiana) School Board, Parish School Superintendent J. Rogers Pope and Denham Springs High School Principal J. Lloyd Wax, seeking injunctive relief and damages for violations of Title VII of the Civil Rights Act of 1964. Leader's complaint alleged (i) pay discrimination by defendants against women high school coaches employed by the school system and (ii) retaliation against Leader for filing grievances and formal complaints calling attention to these discriminatory pay practices and to gender discrimination, in violation of Title IX of the Education Amendments of 1972, in the high school's athletic program.

Leader's complaint reflected that she originally complained of Title VII and Title IX violations as early as 1990, utilizing the Board's established grievance procedure, and when that proved unavailing, she filed a formal complaint with the United States Department of Education Office of Civil Rights. For several years thereafter, her complaint charged, defendant Wax, without justifica-

tion and solely in retaliation for her civil rights complaints, undertook a campaign of harassing treatment of Leader, singling her out for unwarranted and derogatory treatment, publicly criticizing her in front of faculty and stundents and disparaging her to both faculty and students in her absence. In addition, in 1992, principal Wax stripped her of her 16 year position as a high school softball coach, and in 1995, Wax dismissed her, without justification, from her 19 year position as girls' basketball coach, relieved her of all physical education teaching assignments and took away her office in the school gymnasium. In response to these actions, Leader sought administrative remedies with superintendent Pope and the School Board. Unable to obtain even a hearing, Leader resigned her position as a 24 year employee of the School Board, believing that she had been, in effect, constructively discharged.

In December, 1995, Leader filed a Title VII complaint of sex discrimination and retaliation with the Equal Employment Opportunity Commission, of which defendants were notified and to which they responded. Almost a year and a half later, in June, 1997, she received a right to sue letter from the U. S. Department of Justice Civil Rights Division, of which defendants were also notified. On September 9, 1997, within the 90 day limitation period allowed for Title VII suits in district court, she filed the present suit.

C. Procedural History

On September 9, 1997, plaintiff Nikki Leader filed her Title VII complaint in District Court. On September 10, 1997, the magistrate signed an initial scheduling order and on September 16, 1997, the clerk prepared and dated the summonses. Sometime shortly thereafter, the clerk mailed the summonses along with an initial scheduling

order and status report form to plaintiff's counsel. The manila envelope containing the scheduling order and summonses arrived at counsel's office on the same day as several hand-delivered manila envelopes containing depositions and deposition exhibits in an unrelated case. Counsel picked up all the manila envelopes together at the receptionist's desk, including the envelope from the district court clerk with summonses and scheduling order in this case, which was on the bottom, and placed them in the files of the unrelated case. Counsel's inadvertent action bypassed the normal channels of secretaries and/or paralegals who ordinarily open mail and would have attached waivers, timely sent the summons, scheduling order and service waiver forms to the named defendants and calendared the scheduling order date, all without counsel's involvement. However, because of counsel's mistake, neither the secretaries, paralegals nor counsel saw or calendared the date in the scheduling order setting a scheduling conference for December 11, 1997, and no one mailed the summonses, complaint, scheduling order and requests for waiver of service to defendants.

On December 11, 1997, the magistrate issued an order to plaintiff's counsel to show cause why the complaint should not be dismissed or other sanctions imposed for counsel's failure to appear for the December 11th scheduling conference. Plaintiff's counsel responded, explaining the circumstances of the mis-filed summonses and scheduling order, and requested that the magistrate reset the scheduling conference so that counsel could serve notice on the defendants of the scheduling conference along with the summonses, complaint and requests for waiver of service.[1] On January 6, 1998, the magistrate issued

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[1] Counsel understood that the usual practice in the Louisiana Middle District, under the District's Civil Justice Reform Act Plan, Article 1, § 2, is for the clerk to return to plaintiff's counsel, along

an order which found that counsel had shown "good cause" for her failure to attend the December 11th scheduling conference, ordered that no sanctions be imposed and reset the scheduling conference, initially for January 23, later revised to February 13, 1998. On January 13, 1998, on receipt in the mail of the magistrate's order resetting the scheduling conference date, counsel mailed a copy of the complaint, summons, initial scheduling order and request for service waiver to each of the defendants. In the meantime, the 120 day service period had expired on January 7, 1998, while plaintiff's counsel was awaiting the magistrate's ruling on resetting the scheduling conference. Approximately a week later, each defendant received the summons, the complaint and notice of this suit.

On January 27, 1998, plaintiff's counsel received correspondence from defendants' counsel notifying her of his representation of defendants and indicating that he would file responsive pleadings shortly. On January 30, 1998, defendants' counsel filed a motion to dismiss the complaint under FRCP Rule 4(m) for failure of plaintiff's counsel to have the defendants formally served the summons and complaint within 120 days of filing suit.

On or shortly before February 11, 1998, plaintiff's counsel communicated with defendants' counsel in connection with the preparation of a status report required to be submitted to the magistrate before the February 13th scheduling conference. During he course of this communication, defendants' counsel informed plaintiff's counsel that he

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with the executed summonses, an initial order by the magistrate setting a scheduling conference and a form of status report to be prepared jointly by counsel for all parties in connection with the scheduling conference. Counsel understood that these items were required to be sent to defendants along with the summons and complaint.

would withhold signing any waivers of service until after the district court ruled on his motion to dismiss. Plaintiff's counsel referenced the pending motion to dismiss in the status report jointly drafted by the parties and filed the report on February 11, 1998.

On February 13, 1998, the magistrate conducted a scheduling conference and issued a scheduling and discovery order. At the scheduling conference, at which defendants' counsel participated, the magistrate asked defendants' counsel whether his motion to dismiss was now moot since defendants had received notice of the complaint and summons and defendants' counsel had assisted with the status report and was now participating in the scheduling conference. Defendants' counsel informed the magistrate and plaintiff's counsel that he did not want to withdraw his motion to dismiss and would wait until the court ruled on the motion before filing any waivers of service.

On April 2, 1998, the day before the scheduled hearing date on the motion, the district court issued a ruling granting defendants' motion to dismiss, holding that because plaintiff's counsel had not timely filed a memorandum in opposition to the motion to dismiss, plaintiff had failed to show good cause for not meeting the 120 day service deadline imposed by FRCP Rule 4(m). On August 3rd, the date scheduled for hearing on defendants' motion to dismiss,[2] plaintiff's counsel, unaware of the court's August 2nd ruling, filed, out of an abundance of caution, a formal written opposition to the motion to dismiss, pointing out to the court the references in the record which counsel believed showed good cause for the failure to serve the summons

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[2] By Local Rule 78.1M, ther are no actual hearings or oral arguments in the Middle District on motions unless ordered specially by the court. The setting of a hearing date is a mere formality and presumably a targeted decision date.

and complaint within the 120 day time limit.[3] On April 6, 1998, the district court entered judgment dismissing plaintiffs' suit without prejudice.

Within ten days the of the district court's dismissal judgment, plaintiff's counsel filed a motion for reconsideration, arguing that the record reflected good cause for granting an extension of the service deadline or, alternatively, that even in the absence of a showing of good cause, the dismissal was, in fact, with prejudice, because re-filing of the suit by plaintiff was by this time barred by the 90-day statute of limitations on Title VII lawsuits. The district court denied plaintiff's motion for reconsideration.

Plaintiff appealed the rulings of the district court dismissing and refusing to reconsider dismissal of her suit.

The Fifth Circuit held that the district court did not abuse its discretion in concluding that Leader had failed to show good cause for missing the 120 day service deadline established by FRCP 4(m). In support of its ruling, the Fifth Circuit found that the district court had correctly relied upon the definition of "good cause" in *Lindsey v. United States Railroad Retirement Board*, 101 F.3d 444

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[3] Plantiff's counsel had not previously filed a formal opposition to the motion to dismiss in light of (i) the participation by defendants' counsel in the preparation of the status report and the scheduling confernce conducted by the magistrate, all of which occurred after the motion to dismiss was filed, (ii) the references in the record disclosing the reason for counsel's failure to attend the originally-set scheduling conference of December 11, 1997 and for the delay in mailing of the summons and complaint, (iii) the magistrate's January 6, 1998 order in the record finding "good cause" and resetting the scheduling conference, and (iv) the magistrate's suggestion at the scheduling conference that the motion to dismiss was now moot. Counsel acknowledges that the magistrate, other than raising the mootness question at the scheduling conference, did not formally address or rule on the motion to dismiss.

(5th Cir. 1996). The Fifth Circuit also referenced *McGinnis v. Shalala*, 2 F.3d 548 (5th Cir. 1993) for the proposition that this Court's opinion in *Pioneer*, which broadened the standard for determining when "excusable neglect" permits untimely actions under the various federal rules of procedure, "did not change the standard of good cause under Fed.R.Civ.P. 4(m)." [4]

The appellate court further found no abuse of discretion by the district court in declining to extend the service deadline, as permitted by Fed.R.Civ.P. 4(m), even absent a showing of good cause.

In relying on the *Lindsey* and *McGinnis* formulations of "good cause" and in further finding that the district court did not abuse discretion by declining to extend the service period even absent a showing of good cause, the Fifth Circuit did not consider whether Rule 4(m) permits a district court to simply decline to extend the service period if it finds no good cause for untimely service. It did not consider whether the court is additionally required, in order to properly exercise the expanded discretion granted by Rule 4(m) to excuse late service even absent good cause, to apply the "excusable neglect" standard expressed in FRCP 6(b) and defined by the Supreme Court

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[4] Although the Panel opinion referred to FRCP 4(m), *McGinnis v. Shalala* actually stated that *Pioneer* did not change the "good cause" standard under FRCP 4(j), 4(m)'s pre-1993 predecessor, which permitted extension of the 120 day service deadline only upon a showing of good cause. In 1993, Rule 4(j) was amended and now, as Rule 4(m), permits extension of the service deadline even in the absence of a showing of good cause. See Advisory Committee Notes, 1993 Amendments: "The new subdivision explicitly provides that the court shall allow additional time if there is good cause for the plaintiff's failure to effect service in the prescribed 120 days, and authorizes the court to relieve a plaintiff of the consequences of an application of this subdivision even if there is no good cause shown."

in *Pioneer*, and thus weigh the factors identified in *Pioneer* as bearing on the question of excusable neglect.

REASONS FOR GRANTING THE WRIT

This Court has not addressed directly the standard to be applied by district courts in determining whether to dismiss a suit "without prejudice" or extend the service deadline in the case of untimely service under FRCP 4(m). The issue is critical when a statute of limitations bars filing a subsequent suit.

The text of the Rule 4(m) amendment of former Rule 4(j), the Advisory Committee Notes accompanying the amendment, FRCP 6(b) and several opinions of this Court, beginning with *Pioneer*, strongly indicate that a district court is required to apply the excusable neglect standard in deciding whether to dismiss a suit or extend the service deadline, even in the absence of a showing of good cause for the tardiness. Additionally, the Advisory Committee Notes are unusually explicit in stating that "Relief may be justified, for example, if the applicable statute of limitations would bar the refiled action . . ."

However, despite the almost unavoidable conclusion that the excusable neglect standard applies to Rule 4(m) decisions which is compelled by the language of FRCP 6(b), by the Advisory Committee Notes to the 1993 amendment which resulted in Rule 4(m)'s expanded authorization to extend the service deadline even absent good cause, and by this Court's language in *Pioneer* and in subsequent opinions, appellate courts, including the Fifth Circuit, are in amazing discord, even six years after *Pioneer* and the 1993 FRCP 4(m) amendment, about what standard to apply in deciding whether to excuse untimely service under Rule 4(m). Furthermore, in the face of the Ad-

visory Committee's direct and unambiguous assertion that relief may be justified under Rule 4(m) if the applicable statute of limitations would bar a refiled action, several circuits, including the Fifth Circuit, routinely discount, if not totally disregard, the statute of limitations impediment, and its fatally prejudicial effect, in summarily affirming district court decisions to dismiss suits "without prejudice" for untimely service under FRCP 4(m).

On a practical level, district courts are going, simultaneously, in all directions, some, like the district court in this case, dismissing suits without any extensions and almost immediately after the expiration of the 120 day service period, and others granting extensions or declining to dismiss after many months of tardiness or inaction in effecting service. Plaintiffs' substantive rights to have their claims adjudicated on the merits are subject to the whim of district court discretion exercised without clear standards, and with often fatal results, under a statute that, ostensibly, limits the courts' remedial authority for untimeliness to suit dismissal "without prejudice." This Court should grant review of the Fifth Circuit's decision in this case to identify the standard district courts should apply to decisions under FRCP 4(m).

I. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THE THIRD AND FOURTH CIRCUITS REGARDING THE APPLICABLE STANDARD FOR TREATMENT OF UNTIMELY SERVICE OF SUMMONS AND COMPLAINT UNDER FRCP 4(m)

The definition of "good cause" relied on by the Fifth Circuit and the district court incorporated the concept of "excusable neglect" and defined it in a manner significantly at odds with this Court's characterization of excusable neglect in *Pioneer*. According to the Fifth Circuit's

prior opinion in *Lindsey v. United States Railroad Retirement Board, supra,* which recited a long line of Fifth Circuit cases that preceded this Court's *Pioneer* decision, inadvertence, mistake of counsel or ignorance of the rules do not constitute excusable neglect. However, the core holding of *Pioneer,* to the contrary, is that inadvertence, mistake and carelessness may, under certain circumstances, indeed constitute excusable neglect for the purpose of permitting untimely or tardy actions by litigants.

The other case relied on by the Fifth Circuit, *McGinnis v. Shalala, supra,* indicated, in a footnote, that *Pioneer* did not change the standard of "good cause" under Fed. R.Civ.P. 4(j), the predecessor to Fed.R.Civ.P. 4(m). However, while, technically, *Pioneer* did not address the "good cause" standard for excusing late service under Fed.R.Civ.P. 4(j), *Pioneer* nevertheless presents two problems for successor provision Fed.R.Civ.P. 4(m) which the Fifth Circuit did not take into account. First, if the standard of "good cause," as articulated in *Lindsey, McGinnis* and preceding cases, encompasses at a minimum, as the cases state, some form of "excusable neglect," then clearly *Pioneer* did affect the standard as it relates to inadvertence, mistake or carelessness of counsel. Second, Fed.R.Civ.P. 4(m) has expanded the authority of district courts to excuse late service even without a showing of good cause. Thus, if "excusable neglect," as defined in *Pioneer* rather than *Lindsey,* does not constitute "good cause," district courts nonetheless may be required to apply the *Pioneer* "excusable neglect" standard and weigh certain factors in determining whether or not to excuse late service, as permitted by Rule 4(m), even when the plaintiff cannot show "good cause."

The Fifth Circuit did not address in its opinion and did not consider whether the district court, even if it was correct in finding no good cause, was nevertheless re-

quired by *Pioneer* and Fed.R.Civ.P. 6(b) to determine if the actions giving rise to the plaintiff's failure to effect timely service constituted excusable neglect.

Under *Pioneer,* an excusable neglect determination requires the court to take into account "all relevant factors" to determine what is or isn't "excusable." The excusable neglect determination is at bottom an equitable determination and requires the court to weigh factors such as the relative prejudice to the parties for the delay, the length of the delay, and the good faith or culpability of the plaintiff and plaintiff's counsel.

As noted in the Fifth Circuit opinion, upon finding that plaintiff had failed to show good cause, the district court declined to exercise its discretion to excuse late service, though Rule 4(m) authorizes an extension of the service period even absent a good cause showing. The district court, however, did not weigh the *Pioneer*-identified factors in determining whether excusable neglect may have warranted an extension of the service deadline. And, moreover, the Fifth Circuit's opinion did not address whether the district court could, in fact, simply "decline to exercise its discretion," as the Fifth Circuit stated, or whether the court was required by *Pioneer* and FRCP 6(b), in light of the amended and expanded FRCP 4(m) authorization to excuse late service even absent good cause, to undertake a weighing of the *Pioneer* factors in its exercise of discretion to dismiss the case or extend the service deadline. Further, the Fifth Circuit did not give any weight at all to the statute of limitations bar to subsequent suit as a factor that might justify extending the service deadline even in the absence of good cause, despite the Advisory Committee Notes' instruction to do so.

In contrast to the Fifth Circuit opinion in this case, the Fourth Circuit reversed a dismissal for untimely service, holding that the district court had failed to weigh the *Pioneer* excusable neglect factors in declining to extend service and that it was error to do so. *In re Richards*, 1999 U.S. App. LEXIS 908 (4th Cir., January 25, 1999). In addition, the Third Circuit, in reversing a district court refusal to extend the service deadline, stated that statute of limitations relief was intended by the amended Rule 4(m). *Boley v. Kaymark*, 123 F.3d 756 (3rd Cir. 1997).

II. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH A DECISION OF THIS COURT, OTHER DECISIONS OF THE FIFTH CIRCUIT AND DECISIONS OF OTHER CIRCUITS REGARDING THE APPLICABILITY OF THE *PIONEER* EXCUSABLE NEGLECT STANDARD TO UNTIMELY ACTIONS OF LITIGANTS UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

In *Pioneer*, this Court acknowledged that the excusable neglect standard is applicable to all untimely actions under the federal procedural rules, unless such actions are specifically excluded from its application. In *Stutson v. United States*, 516 U.S. 193, 116 S.Ct. 600, this Court stated that the *Pioneer* excusable neglect standard applied to untimely criminal appeals. The Fifth Circuit and other circuits have also applied the *Pioneer* excusable neglect standard to untimely civil as well as criminal appeals and other untimely actions under procedural rules. See for example, *Halicki v. Louisiana Casino Cruises, Inc.*, 151 F.3d 458 (5th Cir. 1998). FRCP 6(b) provides general authority for excusing untimely action under the Federal Rules of Civil Procedure, except in certain specified instances. There is no reason, textual or otherwise to decline to apply the excusable neglect standard expressed in Rule 6(b) to untimely service under Rule 4(m).

The Fifth Circuit's opinion in this case conflicts with Rule 6(b) and cases acknowledging the applicability of the excusable neglect standard to all, not otherwise expressly excluded, untimely actions under the various federal procedural rules.

III. THE FIFTH CIRCUIT'S DECISIONS PRESENTS IMPORTANT QUESTIONS THAT SHOULD BE DECIDED BY THIS COURT REGARDING THE APPLICABILITY OF THE EXCUSABLE NEGLECT STANDARD TO FRCP 4(m) DECISIONS AND THE PROPER TREATMENT OF STATUTE OF LIMITATION PROBLEMS UNDER FRCP 4(m)

There is presently no identified uniform standard applied by district courts or consistently recognized by appellate courts as applicable to a district court's decision under Rule 4(m) to dismiss a suit or extend the service deadline, although more and more district courts, in contrast with appeals courts, are applying the *Pioneer* excusable neglect standard to Rule 4(m) decisions. See for example, *Rosics v. The Waverly Group, Inc.*, 1999 U.S. Dist. Lexis 1079 (N.D. Tex., January 27, 1999); *Wilson v. Time Warner Inc.*, 1999 U.S. Dist. Lexis 2677 (S.D.N.Y., March 11, 1999). Guidance from this Court on this issue would be invaluable.

The question of the standard to be applied in making Rule 4(m) decisions impacts almost exclusively in the context of dismissals and subsequent suits barred by statutes of limitations. Yet despite the explicit language in the Advisory Committee Notes to Rule 4(m) indicating that extensions of the service deadline may be justified when a statute of limitations would bar a refiled action, there is no consensus regarding how this factor should be weighed. Guidance from this Court on this issue also would be invaluable.

CONCLUSION

In *Henderson v. United States*, 517 U.S. 654, 116 S.Ct. 1638 (1996), this Court recognized that, by virtue of its 1993 amendment, Rule 4(m) expressly expanded a district court's authority to extend the 120 day service deadline even if there is no good cause shown. This application presents this Court with an opportunity to identify the standard to be applied by district courts. Unfortunately, the issues raised by this writ application regarding the proper standard to be applied under FRCP 4(m) by district courts in deciding whether to dismiss a suit or extend the service deadline occur with significant frequency and disparate and unpredictable results. For the reasons stated above, this Court should grant certiorari to review the judgment and opinion of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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APPENDICES

APPENDIX A

[Filed Feb. 12, 1999]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-30778

NIKKI LEADER,
Plaintiff-Appellant,

versus

SCHOOL BOARD OF THE PARISH OF LIVINGSTON, LOUISIANA; J. ROGERS POPE; AND J. LLOYD WAX,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Louisiana
(97-CV-878)

Before DAVIS, DUHÉ, and PARKER, Circuit Judges.
PER CURIAM:

Plaintiff-Appellant appeals the dismissal of her suit against Defendants-Appellees for failure to timely serve

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* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limted circumstances set forth in 5TH CIR. R. 47.5.4.

Defendants-Appellees in accordance with FED.R.CIV.P. 4(m) and also appeals the denial of her Motion for Reconsideration.

FED.R.CIV.P. 4(m) authorizes a district court to dismiss a complaint if not timely served, unless good cause is shown for the failure. If good cause is shown, the district court must extend the time for service of process. Even if good cause is not shown, however, the district court may, in its discretion, extend the time for service of process. *Thompson v. Brown*, 91 F.3d 20 (5th Cir. 1996).

In the present case, the district court correctly relied upon the definition of "good cause" in *Lindsey v. United States Railroad Retirement Bd.*, 101 F.3d 444 (5th Cir. 1996). *See McGinnis v. Shalala*, 2 F.3d 548, 550 n.1 (5th Cir.), *reh'g en banc denied*, 5 F.3d 530 (5th Cir. 1993), *cert. denied*, 510 U.S. 1191, 114 S.Ct. 1293, 127 L.Ed.2d 647 (1994) (noting that *Pioneer Investment Services Co. v. Brunswick Associated Limited Partnership*, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993), did not change the standard of good cause under FED.R. CIV.P. 4(m)). The district court found that Plaintiff-Appellant had not shown good cause and granted the Motion to Dismiss. We find no abuse of discretion in this decision and affirm the district court's Judgment of April 6, 1998.

On reconsideration, the district court again found that Plaintiff-Appellant had not shown good cause and also declined to exercise its discretion to extend the time for service of process even when good cause is not shown. We find no abuse of discretion in this decision and affirm the district court's Ruling of June 16, 1998.

AFFIRMED.

APPENDIX B

[Filed Jun. 16, 1998]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

Civil Action No. 97-878-A

NIKKI LEADER

versus

SCHOOL BOARD OF THE PARISH OF LIVINGSTON, LOUISIANA, *et al.*

RULING ON MOTION FOR RECONSIDERATION

This matter is before the court on a motion by plaintiff for reconsideration.[1] Defendants have filed an opposition. There is no need for oral argument. Jurisdiction is allegedly based upon 42 U.S.C. § 2000e-5(f)(3).

Defendants previously moved to dismiss this action due to plaintiff's failing to perfect service within the 120 day limit set by Fed. Rule Civ. P. 4(m). Plaintiff failed to timely file an opposition[2] to the motion to dismiss. The

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[1] While styled a motion for reconsideration, the motion was filed within ten days of the judgment and will be considered as a motion for new trial.

[2] Under LR7.5M, plaintiff's opposition was due on February 23rd. Her opposition was filed on April 3rd, without any acknowledgment or explanation for its being filed untimely.

court granted the motion on April 2, 1998, and judgment was entered on April 6, 1998, dismissing this action without prejudice.

Plaintiff concedes that defendants were not served within the 120 day limit set by Fed. Rule Civ. P. 4(m). Plaintiff contends, however, that good cause for the failure to timely serve defendants has been shown in view of the following. First, counsel for plaintiff obtained summones from the clerk of court one week after this action was filed but they were misplaced or "misfiled" by her staff. Counsel's copy of the scheduling order was also misfiled, causing her to miss the scheduling conference on December 11, 1997. The magistrate judge then issued a show cause order and the misfiled papers were found. In a written response to the show cause order, counsel explained that the package containing the scheduling order had been misfiled and the conference had not been calendered by counsel. On January 6, 1998, the magistrate judge reset the scheduling conference.

Counsel contends that she received the January 6th order a week later and that she "promptly" mailed the complaint, summones, and requests for waiver of service "on or about January 14, 1998". Apparently, counsel for plaintiff contends that magistrate judge's finding of good cause in resetting the scheduling conference should have mooted the motion to dismiss. Finally, counsel argues that a new lawsuit would be barred because more than 90 days have elapsed since plaintiff obtained her right to sue letter and that defendants have not been prejudiced by the 6-8 day delay in service.

Defendants argue that plaintiff has failed to establish "excusable neglect" and that inadvertence of counsel does not constitute "good cause" for failing to comply with Rule 4. According to defendants, they have not yet been

served.[3] Additionally, defendants correctly observe that the magistrate judge has made no determination concerning the delay in service. Defendants argue that counsel for plaintiff has shown such disregard for the rules that the court should not reconsider its prior ruling.

As the court has previously noted, Rule 4(m) authorizes dismissal without prejudice unless plaintiff shows "good cause". The first question the court must consider is whether good cause exists. If good cause is present, the district court *must* extend time for service. *Thompson v. Brown*, 91 F.3d 20 (5th Cir. 1996). If good cause does not exist, the court *may*, in its discretion, decide whether to dismiss the case without prejudice or extend time for service. *Id.*

The court agrees with defendants that plaintiff has clearly failed to make a showing of good cause. The Fifth Circuit has repeatedly held that "[t]o establish 'good cause' the plaintiff must demonstrate at least as much as would be required to show excusable neglect, as to which simple inadvertence or mistake of counsel or ignorance of the rules usually do not suffice." *Lindsey v. U.S. R.R. Retirement Bd.*, 101 F.3d 444 (5th Cir. 1996) (quoting *Peters v. U.S.*, 9 F.3d 344 (5th Cir. 1993).

Hence, the only question is whether the court should exercise its discretion and vacate the prior order dismissing the case without prejudice. By and large, plaintiff has merely shown a series of mistakes on the past of her counsel which would not warrant reconsideration. However, plaintiff additionally points to the Advisory Committee Notes to Rule 4(m) which indicate that relief may be justified if the applicable statute of limitations would bar a subsequent action. The finding herein that plaintiff has

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[3] No waivers have been filed in the record.

not shown good cause would effectively preclude the application of equitable tolling in a refiled action. See, *Lambert v. U.S.*, 44 F.3d 296 (5th Cir. 1995).

If plaintiff had indeed perfected service a few days beyond the 120 limit, as counsel for plaintiff suggests, the court might be inclined to exercise its discretion to retroactively extend the deadline for service. However, the procedure for requesting waiver of service should not even be used when the 120 day limit will expire before the date on which the waiver must be returned. C. Wright, A. Miller, Federal Practice and Procedure § 1137. This is not simply a matter of a few days delay. The court finds that dismissal is proper even though the limitations period has run. See, *Peters v. U.S.*, 9 F.3d 344 (5th Cir. 1993).

Accordingly, the motion by plaintiff "for reconsideration" (doc. no. 14) is treated as a motion for new trial and is hereby DENIED.

Baton Rouge, Louisiana, June 16, 1998.

/s/ John V. Parker
JOHN V. PARKER
Chief Judge
Middle District of Louisiana

APPENDIX C

[Filed Apr. 6, 1998]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

Civil Action No. 97-878-A

NIKKI LEADER

versus

SCHOOL BOARD OF THE PARISH OF LIVINGSTON, LOUISIANA, *et al.*

JUDGMENT

For the written reasons assigned and filed herein:

IT IS FURTHER ORDERED ADJUDGED AND DECREED that the motion to dismiss on behalf of defendants is hereby GRANTED, and this action is hereby DISMISSED, without prejudice.

Baton Rouge, Louisiana, April 6, 1998.

/s/ John V. Parker
JOHN V. PARKER
Chief Judge
Middle District of Louisiana

APPENDIX D

[Filed Apr. 2, 1998]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

Civil Action No. 97-878-A

NIKKI LEADER

versus

SCHOOL BOARD OF THE PARISH OF LIVINGSTON, LOUISIANA, *et al.*

RULING ON MOTION TO DISMISS

This matter is before the court on a motion by the Livingston Parish School Board, J. Rogers Pope and J. Lloyd Wax. No opposition has been filed. There is no need for oral argument. Jurisdiction is allegedly based upon 42 U.S.C. § 2000e-5(f)(3).

Defendants move to dismiss based upon plaintiff's failure to timely serve them within 120 days. The complaint was filed on Sept. 9, 1997 and defendants represent that service was not made until January 13, 1998, a few days beyond the 120 day limit set by Fed. Rule Civ. P. 4(m). Defendants recognize that dismissal for failure to serve within 120 days is no longer mandatory but they argue the case should be dismissed because plaintiff has offered no excuse for failing to timely serve defendants.

Rule 4(m) authorizes dismissal without prejudice unless plaintiff shows "good cause". The first question the court must consider is whether good cause exists. If good cause is present, the district court must extend time for service. *Thompson v. Brown*, 91 F.3d 20 (5th Cir. 1996). If good cause does not exist, the court may, in its discretion, decide whether to dismiss the case without prejudice or extend time for service. Id.

Plaintiff has not filed an opposition and she has accordingly failed to make a showing of good cause. In view of plaintiff's failure to make any response whatsoever and for the reasons given by defendants in their memorandum, the court finds that this matter should be dismissed without prejudice.

Accordingly, the motion by defendants (doc. no. 7) to dismiss is hereby GRANTED and this action will be dismissed without prejudice.

Baton Rouge, Louisiana, April 2, 1998.

/s/ John V. Parker
JOHN V. PARKER
Chief Judge
Middle District of Louisiana

APPENDIX E

[Filed Jan. 6, 1998]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

Civil Action No. 97-878-A-M2

NIKKI LEADER

versus

SCHOOL BOARD OF THE PARISH OF LIVINGSTON, LOUISIANA, *et al.*

ORDER

Good cause having been shown by plaintiff's *Response to Show Cause Order and Request to Reset Scheduling Conference* filed December 22, 1997;

IT IS ORDERED that no sanctions shall be imposed in this matter.

IT IS FURTHER ORDERED that the scheduling conference is re-set to FRIDAY, JANUARY 23, 1998, AT 2:30 P.M. A Joint Status Report shall be filed no later than two (2) days prior to this conference.

Signed in chambers in Baton Rouge, Louisiana, this 6th day of January, 1998.

/s/ Christine Noland
MAGISTRATE JUDGE CHRISTINE NOLAND

APPENDIX F

[Filed Dec. 11, 1997]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

Civil Action No. 97-878-A-M2

NIKKI LEADER

versus

SCHOOL BOARD OF THE PARISH OF LIVINGSTON, LOUISIANA, *et al.*

ORDER

Considering plaintiff's counsel's failure to appear for the scheduling conference scheduled for 2:30 P.M. on Thursday, December 11, 1997;

IT IS ORDERED that plaintiff's counsel, Katherine Wheeler, show cause in writing to the undersigned at U.S. District Court, 777 Florida Street, Suite 375, Baton Rouge, Louisiana 70801 no later than ten (10) days from the date of this Order why this suit should not be dismissed and other appropriate sanctions imposed for failure to appear for the scheduling conference.

Signed in chambers in Baton Rouge, Louisiana, this 11th day of December, 1997.

/s/ Christine Noland
MAGISTRATE JUDGE CHRISTINE NOLAND

Supreme Court, U.S.
F I L E D
AUG 19 1999
OFFICE OF THE CLERK

No. 98-1880

IN THE

Supreme Court of the United States

NIKKI LEADER,

Petitioner,

v.

SCHOOL BOARD OF THE PARISH OF LIVINGSTON, LOUISIANA; J. ROGERS POPE and J. LLOYD WAX,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

Table of Cited Authorities ii

Statement of the Case 1

Reasons for Denying the Writ 3

I. Determining "Good Cause" Under The *Pioneer* Standard 4

II. The Trial Court's Refusal To Extend The Time For Service 9

Conclusion 10

TABLE OF CITED AUTHORITIES

Page

Cases Cited:

Edward H. Bohlin Co., Inc. v. Banning Co., Inc., 6 F.3d 350 (5th Cir. 1993) 8

Halicki v. Louisiana Casino Cruises, Inc., 151 F.3d 465 (5th Cir. 1998) 4, 5, 7, 8

In Re Kirkland, 86 F.3d 172 (10th Cir. 1996) 4

Link v. Wabash R. Co., 370 U.S. 626, 82 S. Ct. 1386 (1962) 7

Pioneer Inv. Services v. Brunswick Associates, 507 U.S. 380, 1113 S. Ct. 1489 (1993) 3, 4, 5, 7

Thompson v. Brown, 91 F.3d 20 (5th Cir. 1996) 3

Winters v. Teledyne Movible Offshore, Inc., 776 F.2d 1304 (5th Cir. 185) 4

Rules Cited:

FRCP Rule 4(a)(5) 5

FRCP Rule 4(j) 4

FRCP Rule 4(m) ..... *passim*

STATEMENT OF THE CASE

Nikki Leader sued the Livingston Parish School Board and two of its administrators, J. Rogers Pope and J. Lloyd Wax, generally alleging gender discrimination with the severance of her employment from the Livingston Parish school system. The EEOC reviewed the case and issued a Right to Sue Letter on June 12, 1997. Ms. Leader filed suit on September 9, 1997, the eighty-ninth day after the issuance of the Right to Sue Letter.

Service of the Complaint, however, was not attempted until January 13, 1998, more than 120 days after filing suit, when Ms. Leader mailed the Summons and the Complaint to the defendants. Ms. Leader did not apply for an extension of time to accomplish service.

The delay in service resulted from a series of errors by Ms. Leader's counsel. When the Complaint and Citation were originally sent to counsel for service in September, 1997, they were inadvertently put away in a file cabinet without any attempt at service. On December 11, 1997, still within the service period, Ms. Leader's counsel failed to appear at a scheduled status conference. The following day, December 12, the Magistrate ordered Ms. Leader to appear for a sanctions hearing.

Rather than serving the suit at that point, counsel chose to await the Magistrate's ruling on the sanctions hearing. The Magistrate ruled on the sanctions hearing on January 6, 1998, and relieved Ms. Leader from any further obligation for failing to appear at the status conference.

It was then, on January 13, 1998, that Ms. Leader attempted service for the first time by mailing the Complaint and Citation to the School Board defendants. The mailing came more than 120 days after filing the original Complaint.

The defendants, Livingston Parish School Board, J. Lloyd Wax, and J. Rogers Pope, filed a Motion to Dismiss for failure to timely serve under FRCP Rule 4(m). The court set the matter for hearing on April 3, 1998 at 10:00 *a.m.*

Ms. Leader filed no opposition to the Motion to Dismiss in advance of the hearing. Rather, she filed her opposition at 4:00 *p.m.* on the day of the hearing. The trial court had ruled on the Motion on April 2, 1998, after receiving no opposition as required by local court rule.

Ms. Leader then filed a Motion for Reconsideration. The trial judge considered all of Ms. Leader's arguments purportedly excusing her failure to serve. The district judge found lack of good cause, Ms. Leader having shown nothing more than a series of mistakes by her counsel. After considering all of the relevant facts and circumstances, the court further determined that discretionary factors did not favor Ms. Leader's plea for an extension of the service deadline. The court denied the reconsideration.

On appeal to the Fifth Circuit Court of Appeal, the court determined that the district court did not abuse its discretion under the peculiar circumstances of the case. On February 12, 1999, the Fifth Circuit affirmed the decision of the district court.

REASONS FOR DENYING THE WRIT

Rule 4(m) requires service within 120 days of the filing of the Complaint. A plaintiff's failure to timely serve the Complaint results in dismissal without prejudice, unless the plaintiff can show "good cause" for the delay or the trial court exercises its discretion to extend the service delay. *Thompson v. Brown*, 91 F.3d 20 (5th Cir. 1996). Ms. Leader did not serve the Complaint within 120 days and concedes that she did not even mail service until after the 120 days had expired. The delay was attributable to a series of errors by her counsel.

The district judge found on original hearing on the Motion to Dismiss that the plaintiff made no showing of good cause. She did not file an opposition to the motion and so provided no factual basis for the trial court to find good cause for the delay. On Reconsideration the court considered Ms. Leader's evidence and found that her mere showing of a series of mistakes on the part of her counsel was insufficient grounds to alter or amend the original judgment. The district judge then declined to exercise its discretion to extend the time for service because Ms. Leader attempted mail service only after the 120 day period had expired.

The district court did not err in finding that Ms. Leader failed to show good cause for her failure to attempt service timely. Measured by the standard of *Pioneer Inv. Services v. Brunswick Associates*, 507 U.S. 380, 1113 S. Ct. 1489 (1993), Ms. Leader cannot seriously argue that the sum of her counsel's errors amounts to "excusable neglect".

Nor did the district court abuse its discretion by determining that the admittedly harsh consequences of dismissal were outweighed by the prejudicial effect upon the defendants and the administration of justice in the district court.

I.

DETERMINING "GOOD CAUSE" UNDER THE *PIONEER* STANDARD

Ms. Leader argues that Rule 4(m)'s "good cause" provisions for delaying service should be judged by the standards of *Pioneer Inv. Services v. Brunswick Associates*, 507 U.S. 380, 1113 S. Ct. 1489 (1993), and *Halicki v. Louisiana Casino Cruises, Inc.*, 151 F.3d 465 (5th Cir. 1998).[1] Assuming the application of the *Pioneer* standard to the facts of this case, the trial court considered all of the factors — factual, legal, and equitable — relevant to an assessment of "good cause" and found that Leader had not shown a good reason for the service delay. The trial court's determination is consistent with *Pioneer* and with Fifth Circuit decisions on "excusable neglect".

In the *Pioneer* case, a creditor's lawyer, newly hired after the issuance of filing schedules, overlooked a bar date obscurely stamped in the corner of one of the bankruptcy notices. The creditor did not file its claim within the bar date, and the Bankruptcy Court disallowed the claim.

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1. A strong argument can be made that "good cause" under Rule 4(m) may be judged by a stricter standard than *Pioneer* and *Halicki*. The courts have long held that "good cause" under Rule 4(m) requires **at least** as much as would be required to show excusable neglect. On that basis, the Tenth Circuit recently held that "good cause" under former Rule 4(j) is judged by a different standard than "excusable neglect". *In Re Kirkland*, 86 F.3d 172 (10th Cir. 1996), citing *Winters v. Teledyne Movible Offshore, Inc.*, 776 F.2d 1304 (5th Cir. 185). Nonetheless, for purposes of this case, argument is made upon the "more flexible" standard of *Pioneer*.

On review, this Court noted that Bankruptcy Rule 9006(b)(i) allows a court to extend the time established as a bar date upon a showing of "excusable neglect". The court then went on to establish a flexible, equitable standard to measure "excusable neglect" under Rule 9006(b)(i) to include such factors as danger of prejudice to the defendant, length of delay and potential impact on judicial proceedings, the reason for the delay including whether it was in the control of counsel, and whether the movant acted in good faith.

In *Halicki v. Louisiana Casino Cruises, Inc.*, 151 F.3d 465 (5th Cir. 1998), the Fifth Circuit applied the *Pioneer* standard in a civil context where plaintiff's counsel untimely filed a motion to alter or amend a grant of summary judgment under Rule 59(e) and allowed the 30 day appeal delay to run, believing that the filing of the Rule 59(e) motion had suspended the delay for appeal. The plaintiff sought to excuse the untimeliness of the 59(e) filing on the grounds that his counsel mistakenly thought that the mailing of the Judgment enlarged Rule 59(e)'s ten day delay. The trial court found no excusable neglect under Rule 4(a)(5) and dismissed the appeal on the summary judgment.

Consistent with *Halicki* and prior jurisprudence, the Fifth Circuit found nothing in the instant case to warrant reversal. Ms. Leader filed her Complaint on September 9, 1997. She had 120 days to effect the service, which would have run on January 7, 1998. However, when the service copies arrived in her counsel's office approximately one week after filing, they were put away in a filing cabinet. Counsel also failed to calendar a status conference on December 11, 1997, well within the 120 day service period.

On December 12, 1997, the Magistrate rang the alarm bell and brought to counsel's attention the failure to meet deadlines. The Magistrate noticed a sanctions hearing within 10 days. Ms. Leader's counsel recovered the service documents from the file cabinet. But, rather than serving the suit at that juncture, plaintiff's counsel elected to await the outcome of the Magistrate's sanction hearing. By the time the hearing was concluded, the service delay had run without Ms. Leader even attempting service.

When Ms. Leader finally mailed service on January 13, 1998, she was outside the 120 day service period. She could easily have rectified the service error after December 12, 1997, by appointing a process server. These defendants are not hard to find. They are the School Board, Superintendent of Schools and the school principal where Leader worked for 18 years.

On January 30, 1998, when the School Board defendants filed a Motion to Dismiss for Failure to Serve Defendants Timely Under FRCP 4(m), Ms. Leader filed no opposition to the Motion to Dismiss. She did not provide the trial court with any argument or any factual basis for finding "good cause" for the delay.[2]

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2. Ms. Leader filed an Opposition to the Motion to Dismiss only at 4:03 p.m. on the afternoon of the April 3rd hearing, even though the hearing was scheduled for 10:00 a.m. By then, the court had ruled dismissing the Complaint. Ms. Leader argues that she felt like enough was in the record, and no opposition was needed. It should be noted that the only facts in the record at that point were that Ms. Leader's counsel failed to attend a scheduled status conference because she had not placed the conference on her calendar.

The record also reflects that Ms. Leader had an unusually long time to develop her claim. She left her employment with the defendants in August, 1995, and filed an EEOC claim within a few months after. A right to sue letter did not issue until June, 1997. Unlike most claimants who have one year from the precipitating events in which to file suit, Ms. Leader had more than two.

By the same token, the defendants were further removed from the events of the suit by the time service was made. During the 120 day service period, the Denham Springs High School administration building burned with the loss of the school's administrative records, many germaine to this case.

All of those facts were before the district judge when he dismissed the suit.

On rehearing, the district court considered all of the factual and equitable points raised by Ms. Leader and found no grounds for changing its prior ruling. Ms. Leader had not demonstrated "good cause" for untimely service but had "merely shown a series of mistakes on the part of her counsel".

Parties in litigation are held accountable for the acts and omissions of their attorneys. A plaintiff cannot avoid the consequences of the acts of her chosen counsel on the grounds that counsel's conduct would prejudice her rights. *Pioneer* at 1499, citing *Link v. Wabash R. Co.*, 370 U.S. 626, 82 S. Ct. 1386 (1962).

It is a rare case, indeed, where the misinterpretation of a federal rule qualifies as excusable neglect. *Halicki v. Casino*

Cruises, Inc., 151 F.3d 465 (5th Cir. 1998); *Edward H. Bohlin Co., Inc. v. Banning Co., Inc.*, 6 F.3d 350 (5th Cir. 1993).

Ms. Leader suggests in her application for writs, that the Magistrate's relieving her of sanctions for the failure to attend the December 11th status conference should excuse her failure to effect service of the Complaint. That argument turns the law on its head and makes one error in following the federal rules justification for violating another. Even if Ms. Leader's initial error in filing away the service copies were excusable, her delay following the December 11, 1997, status date is not. Failing to even attempt service in the wake of the Magistrate's Order on December 12, 1997, hardly improves Ms. Leader's position.

Ms. Leader also improperly cites an off-hand remark by the Magistrate that the lack of service is moot once the defendants become aware of the suit and attend a status conference. It is patently unfair to the Magistrate to infer or imply that she made any finding on the service issue. Nothing in the record suggests that the Magistrate made any determination concerning the delay in service, and Leader's argument in that regard is inappropriate.

Otherwise, Ms. Leader points to nothing in the record to support a finding of "good cause" under Rule 4(m).

II.

THE TRIAL COURT'S REFUSAL TO EXTEND THE TIME FOR SERVICE

The trial judge did not arbitrarily deny Leader's plea for a discretionary extension of the service period. The 1993 amendment to Rule 4(m), indeed, contains a "mercy" provision, which gives a district court discretion to extend the time for service even in the absence of "good cause". Whether the claim will be time-barred is one factor to be weighed heavily in the exercise of the court's discretion. However, the discretionary provision is not a license to disregard the service delay with impunity. Rather, the courts must balance the interest in the administration of justice, possible harm to the function of the courts in enforcing the federal rules, potential prejudice to the defendant, and the nature of the delay.

The district court here considered Ms. Leader's arguments in that regard and found dismissal to be appropriate under the circumstances. Service was not a "near miss" as Ms. Leader suggests. Ms. Leader had an opportunity to atone for her original error in filing away the service documents when the court brought matters to her attention on December 12, 1997. She chose, instead, to wait. She did not even mail service until the 120 day period had elapsed. Leader then chose to rest upon facts in the record (though adverse to her) rather than filing an opposition to the Motion to Dismiss.

The district court was not wrong to consider such disregard of the federal rules and the administration of the court to outweigh the adverse impact of dismissal upon the plaintiff. Unless this Honorable Court is prepared to adopt an absolute rule that all untimely served claims are shielded from dismissal if time-barred upon refiling, the district court's discretion should be upheld.

CONCLUSION

Ms. Leader does not present a compelling case for overturning the district court or the appellate court's decision. She made no showing of good cause on original hearing on the Motion to Dismiss. She did not provide a reasonable basis for changing the original decision On Reconsideration. She advanced no viable legal argument for reversal. The circumstances surrounding her failure to serve timely do not constitute "good cause". If such amounts to good cause for the failure to serve, there can hardly be a case where a plaintiff will lack good cause.

The events giving rise to the suit occurred more than two and one-half years before notice to the defendants, and a fire burned the school administration building where essential records were kept during the 120 day service period. The lower courts were not wrong to dismiss the suit for failure to timely serve. Accordingly, the School Board defendants respectfully ask that the Court reject Ms. Leader's application.

Respectfully submitted,

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